BRARY
SUPREME COURT U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 272

ARTHUR TERMINIELLO,

Petitioner,

vs.

CITY OF CHICAGO,

Respondent.

On Writ Of Certiorari To The Supreme Court of Illinois

PETITIONER'S REPLY BRIEF.

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Introduction.

Respondent's answering brief seems to have been written for the purpose of beclouding the one and only issue in the case at bar—*free speech*—in the forlorn hope that this Honorable Court might become confused and bemused and,

so have its attention diverted to other matters discussed therein that have no bearing whatsoever upon that one all important issue.

It is only because of a sincere feeling and belief that his wrongful conviction in the case at bar violates the sacred right of *free speech* guaranteed to him by the Constitution that petitioner has appealed from the judgments of the lower Courts, instead of paying the fine of $100 and costs assessed against him (after all, a purely nominal amount as compared to the cost of appealing). No doubt in recognition of the high principle, not the insignificant sum of money, involved, he has been accorded the high privilege, due to the wonderful system of government under which we live in this free America, of appearing before this, the greatest Court of last resort in the World, for review of that conviction, with every hope that this Court will reaffirm in this case what it has so frequently and consistently held concerning the right of *free speech*, reverse the judgments of the lower Courts, and thus, at long last, accord him the justice and relief to which he sincerely feels entitled.

Respondent's answering brief is not an "answer" at all. It is repetitious. In support of its two points, it presents, in part, almost identical arguments, encroaching unduly upon the time of the Court. In reality, it hardly merits a reply. Were petitioner to reply to it fully, sentence for sentence and paragraph for paragraph, he would himself be adding to the confusion which it sets up and at least tend to divert the attention of the Court from the *free speech* issue. This he will not do. He feels that the brief already filed herein amply supports the contention that his wrongful conviction violates his Constitutional right of

free speech and that the judgments of the lower Courts should be reversed.

But he nevertheless deems it appropriate and possibly of help to the Court to comment upon some of the matters covered in respondent's answering brief.

Attempt To Prejudice The Court?

On page 16 of its brief, respondent states, "He" (petitioner) "charged Mrs. Roosevelt with being a Communist (R. 71)."; on page 22, the statement is repeated as follows: "Mrs. Roosevelt is charged with being a Communist (R. 71)."

Reference to page 71 of the Record shows that it was Gerald L. K. Smith, if anyone, and not the petitioner, who charged Mrs. Roosevelt with being a Communist. The petitioner did, it is true, take issue with a statement concerning "the revolution" attributed to Mrs. Roosevelt. This he had a perfect right to do. Mrs. Roosevelt is a public figure who has never been accused of dodging controversial issues and is a newspaper columnist, expressing her views freely in a daily column. As such, she is, of course, subject to criticism. It may well be that Mr. Smith slandered Mrs. Roosevelt by charging her with being a Communist, and that the petitioner did likewise in referring to it in his speech. If so, Mrs. Roosevelt, and nobody else, might properly have filed an action for damages for the slander against one or both. It certainly does not justify depriving petitioner of his right of *free speech*.

But what purpose is served by respondent in thus falsely and repeatedly attributing the charge to petitioner? Can it possibly be for any purpose except to prejudice the Petitioner with this Court?

Petitioner Admittedly "Anti 'New Deal'."

It would be futile to argue that petitioner, in February 1946, was not "anti 'New Deal'". His speech clearly stamps him as such. But he should not, because of that, be deprived of his right of *free speech*. This Country, as we have known it, would soon cease to exist, were citizens to be deprived of the right to criticize the administration in power freely and harshly.

Nowhere is this precise point better stated than by a distinguished member of this Court in his dissent in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, in the following words (Page 301):

> "In determining whether the injunction does deprive petitioners of their constitutional liberties, we cannot and should not lose sight of the nature and importance of the particular liberties that are at stake. And in reaching my conclusion I view the guaranties of the First Amendment as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned. Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death."

In *Baumgartner* v. *U. S.*, 322 U. S. 665, another distinguished member of this Court wrote in the majority opinion (Page 673):

> "One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."

And in the *Schaefmmer Case* (279 U. S. 644), the late Mr. Justice Holmes, dissenting, said (Page 654):

> "... if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."

Did Illinois Supreme Court Decision "Dispose Of" Petitioner's Rights?

On page 3 of its brief, respondent states the following: "His" (petitioner's) "claim under the Constitution of the State of Illinois *has been disposed of* by the judgment of the Supreme Court of Illinois (400 Ill. 231)." (Emphasis supplied.) That, of course, is not true.

The opinion in the *Baumgartner* Case, cited above, contains the following, at page 670:

> "That the concurrent findings of two lower courts are persuasive proof in support of their judgments is a rule of wisdom in judicial administration. In reaffirming its importance we mean to pay more than lip service. But the rule does not relieve us of the task of examining the foundation for findings in a particular case."

And at page 671, the following:

> "Deference properly due to the findings of a lower court does not preclude the review here of such judgments."

The Fourteenth Amendment to the Constitution (Page 41 of Petitioner's brief) protects a person from action by any State which abridges the rights guaranteed by the First Amendment to the Constitution. The greatest rights of American citizenship are guaranteed by the First Amendment, including *free speech*, the one so clearly involved in

the case at bar. So, certainly, any decision of the Supreme Court of any State affirming a conviction of disorderly conduct against a citizen for *making a speech*, is at once suspect and properly subject to review by this Honorable Court. The sacred right of *free speech* cannot be so lightly *disposed of*, and the adverse decision of the Supreme Court of the State of Illinois, with all due respect to the learned jurists who composed it, did not *dispose of* petitioner's right of *free speech*.

In this connection, it should be noted that respondent, on page 2 of its brief, alludes to "the speech which forms the background for this prosecution".

Professor Zechariah Chafee, Jr. On "Free Speech".

Professor Zechariah Chafee, Jr., of Harvard University Law School, a recognized authority on the subject of "Free Speech", makes the following poignant statement in the introduction to his book "Free Speech in the United States" (1941), at page ix:

> "Unfettered discussion of war aims in 1918 might have produced a better treaty, rallied liberals around President Wilson to carry the United States into the League of Nations, and saved English children from German bombs in 1941. Thus unremitting regard for the First Amendment benefits the nation even more than it protects the individuals who are prosecuted. The real value of freedom of speech is not to the minority that wants to talk, but to the majority that does not want to listen."

On page 4 the following appears:

> "I am not an atheist, but I would not roast one at the stake as in the sixteenth century, or even exclude him from the witness stand as in the nineteenth. Neither am I a pacifist or an anarchist or a Socialist or a Bolshevik. I have no sympathy myself with the views

of most of the men who have been imprisoned since the war began for speaking out." My only interest is to find whether or not the treatment which they have received accords with freedom of speech. That principle may be invoked just as eagerly in future years by conservatives. "Whatever political or economic opinion falls within the scope of the First Amendment ought to be safeguarded from governmental interference by every man who has sworn to uphold the Constitution of the United States, no matter how much he disagrees with those who are entitled to its protection or how lofty the patriotism of those who would whittle away the Bill of Rights into insignificance.

"A friend of Lovejoy, the Abolitionist printer killed in the Alton riots, said at the time:

"We are more specifically called upon to maintain the principles of free discussion in case of unpopular sentiments or persons, as in no other case will any effort to maintain them be needed."

Meeting Itself In No Sense Unlawful.

The opinion of the Supreme Court of the State of Illinois contains the following (R. 142):

"Defendant, self-described as a member of the 'lunatic fringe' by his conduct in scheduling an address in a large auditorium, invited a storm of protest, (fol. 19) which was concentrated in the mob of approximately one thousand persons gathered in the public streets outside the auditorium. Just as he drew his audience into the auditorium, he drew hundreds of his antagonists to the area adjacent to the hall. As related, the explosive situation thus created by defendant resulted in innumerable acts of violence extending over a period of several hours. The air was filled with shouts and noisy chanting, property was destroyed, rocks, brickbats and stench bombs were thrown at the auditorium, and both private individuals and police officers were assaulted. *The meeting was, indeed, a diversion tending to a breach of the peace.*" (Emphasis added.)

With this finding, petitioner respectfully takes issue and suggests that it is unwarranted by the facts in the case as revealed by the Record. He suggests, further, that it would be most unjust and un-American to permit a lawless mob of persons holding opposite views to assemble and riot in an attempt to prevent a meeting and a contemplated speech, and then hold the speaker, who manages to speak despite the mob, responsible for the lawlessness and, under that pretext, hold him guilty of "disorderly conduct." Even the affirming majority opinion of the Illinois Appellate Court for the First District contains the following characterization of the lawless mob (R. 17):

> "The demonstration on the outside of the meeting hall is one we must condemn as un-American and as clear a violation of law as can come to the observation of any court. (fol. 2-24) Many of them were arrested, but the police should have done their full duty by dispersing the mob and suppressing the demonstration."

Professor Chafee, on page 151 of "Free Speech in the United States", makes the following comment on this very point:

> "This breach of the peace theory is peculiarly liable to abuse when applied against unpopular expressions and practices. It makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence. The *reductio ad absurdum* of this theory was the imprisonment of Joseph Palmer, one of Bronson Alcott's fellow-settlers at 'Fruitlands', not because he was a communist, but because he persisted in wearing such a long beard that people kept mobbing him, until law and order were maintained by shutting him up. A man does not become a criminal because some one else assaults him, unless his own conduct is in itself illegal or may be reasonably considered a direct provocation to violence.

"Thus all these crimes of injurious words must be kept within very narrow limits if they are not to give excessive opportunities for outlawing heterodox ideas."

On page 160, the following pertinent comment appears:

"Since any gathering of radicals is likely to be attacked, the easiest way to preserve the peace is to forbid and break up such gatherings. Therefore, it may be contended that a meeting which is not otherwise illegal may become so solely because it will excite violent and unlawful opposition." (In footnote at this point, the following appears: "See Dicey, *Law of the Constitution*, chap. vii, 'the Right of Public Meeting' The Salvation Army case is *Beatty v. Gillbanks*, 9 Q. B. D. 308 (1882).")

"This is the doctrine of the long beard case over again. Let us see how it works out with respect to meetings. The Salvation Army holds a service in a public place, knowing that a mock-organization called the Skeleton Army intends to molest it. The Skeleton Army appears, and begins to throw stones. The members of the Salvation Army are arrested by the police for holding an unlawful assembly. Obviously they must be released. Their guilt cannot be determined by the intolerance of wrong-doers. Apart from the question of permits, and special regulation by ordinances and statutes, the police cannot treat a meeting as unlawful simply because it may probably or naturally lead others to attack it. And if a permit is refused on that ground alone, a small number of intolerant men by passing the word around that they intend to start a riot can prevent any kind of meeting, not only of radicals who want a revolution, but of socialists, of moderates like the Committee of '48, of negroes, of novel religious sects, of Freemasons in an anti-masonic community. Indeed, on any such theory a gathering which expressed the sentiment of a majority of law-abiding citizens would become illegal because a small gang of hoodlums threatened to invade the hall. The proper remedy for these emergencies is police protection, to which men are entitled in public places, whether they are there singly or in groups."

A further citation of the *Beatty* Case discussed by Professor Chafee is "2 Law Reports (Col.) 1847, 15 *Cox's Criminal Law Cases* 138". In that case, "Gillbanks" was "superintendent of the constabulary" at Weston-super-Mare, England; "Beatty" was a captain and a leader of the Salvation Army. Beatty and two others were convicted for "unlawfully and tumultuously assembling with others to the disturbance of the public peace." Beatty and many others had assembled and were set upon by the "Skeleton Army"; a group opposed to the Salvation Army.

The opinion, by Mr. Justice Field, contains the following (Page 145):

> "There is no doubt that the appellants did assemble together with others in great numbers, but that alone is insufficient. The assembly must be a 'tumultuous assembly', and 'against the peace' in order to render it an unlawful one . . . But the evidence as set forth in the case shows that, so far from that being the case, the acts and conduct of the appellants caused nothing of the kind, but, on the contrary, that the disturbance that did take place was caused entirely by the unlawful and unjustifiable interference of the Skeleton Army, a body of persons opposed to the religious views of the appellants and the Salvation Army, and that but for the opposition and molestation offered to the Salvationists by these other persons, no disturbances of any kind would have taken place. The appellants were guilty of no offense in their passing through the streets and why should other persons interfere with or molest them? What right had they to do so? If they were doing anything unlawful it was for the magistrates and police, the appointed guardians of law and order, to interpose. The law relating to unlawful assemblies, as laid down in the books and cases, affords no support to the view of the matter for which the learned counsel for the respondent was obliged to con-

tend, viz, *that persons acting lawfully are to be held responsible and punished merely because other persons are thereby induced to act unlawfully and create a disturbance.*" (Emphasis supplied.)

At page 146 the following appears:

> "I hope, and I cannot but think, that when the Skeleton Army, and all other persons who are opposed to the proceedings of the Salvation Army, come to learn, as they surely will learn, that they have no possible right to interfere with or in any way to obstruct the Salvation Army in their lawful and peaceable processions, they will abstain from opposing or disturbing them. It is usual happily in this country for people to respect and obey the law when once declared and understood, and I hope and have no doubt that it will be so in the present case. But, if it should not be so, there is no doubt that the magistrates and police, both at Weston-super-Mare and everywhere else, will understand their duty and not fail to do it efficiently, or hesitate, should the necessity arise, to deal with the Skeleton Army and other disturbers of public peace as they did in the present instance with the appellants, for no one can doubt that the authorities are anxious to do their duty to prevent a disturbance of the public peace."

The decision in the *Beatty* Case was a *precedent decision*. Though, as indicated, it was rendered in 1882, it is still good law. The application of the *Beatty* Case to the case at bar will without doubt be readily apparent to this Honorable Court. The two cases are exactly in point. In the *Beatty* Case, the wrongful conviction was reversed. This Court is respectfully urged to follow the precedent so set and use the *Beatty* Case as the basis, at least in part, for reversal of the wrongful conviction of petitioner in the case at bar.

Petitioner's Characterization Of Mob Justified.

The greatest stress is placed by respondent upon the use by petitioner of the words "scum" and "slimy scum" in his speech (R. 68). The use of these terms must be considered in the light of what was transpiring around the hall while petitioner spoke, and what had transpired before.

Petitioner, it will be noted, said: " . . . I *suppose* there are some of the scum got in by mistake . . . " A little later, he said: "Now, my friends, nothing you hear tonight so far, nothing that I would say can begin to express the contempt I have for that howling mob on the outside. Nothing I can say can express the contempt I have for anyone who would dare to attempt to undermine the freedom of speech and all other freedoms of America. And nothing I could say tonight could begin to express the contempt I have for the slimy scum that got in by mistake."

The true character of the mob outside, and its lawlessness, is highlighted by its attempt, as related in Petitioner's speech at this point, to stampede the meeting by sending in "firemen with tin hats", presumably in response to a false alarm of fire. It is horrible to contemplate what injury and loss of life might have ensued, had this abortive attempt to "stampede" the capacity audience succeeded.

Petitioner testified (R. 112): "We got there" (that is, to the building in which the meeting was held) "approximately fifteen or twenty minutes past eight. The car stopped at the front entrance. There was a crowd of three or four hundred congregated there shouting and cursing and picketing . . . When we got there the pickets were not marching; they were body to body and covered the side

walk completely, some on the steps *so that we had to form a flying wedge to get through. Police escorted us to the building*, and I noticed four or five others there. (R. 113)

". . . They called us 'God damned Fascists, Nazis, ought to hang the so and so's. When I entered the building I heard the howls of the people outside. . . . The officers threatened that if they broke the door again they would arrest them and every time they opened the door a little to look out something was thrown at the officers, including ice-picks and rocks. . . . A number of times the door was broken, was partly broken through. There were doors open this way and they partly opened and the officers looked out two or three times and each time ice-picks, stones and bottles were thrown at the police at the door . . . I saw a number of windows broken by stones and missiles. I saw the back door being forced open, pushed open. The front door was broken partly open after the doors were closed . . . There were other speakers who spoke before me and before I spoke I heard things happening in the hall and coming from the outside. I saw rocks being thrown through windows and that continued throughout at least the first half of the meeting, probably longer, and again attempts were made to force the front door, rather the front door was forced partly. The howling continued on the outside, cursing could be heard audibly in the hall at times. Police were rushing in and out of the front door protecting the front door, and there was a general commotion, all kinds of noises—all from the outside. Between the time the first speaker spoke and I spoke, stones and bricks were thrown in all the time. I started to speak about 35 or 40 minutes after the meeting started, a little later than nine o'clock."

Under cross-examination, petitioner testified as follows (R. 116):

"My use of the word 'scum' was an extemporaneous part of the speech. *It was due to the fact that my*

own people were spit on and kicked and bruised."
(Emphasis added.)

Respondent, which now hangs its whole case upon the use of the word "scum" by petitioner, objected to the latter's underlined explanation as to why he used the term. For some unaccountable reason, the objection was sustained and, in effect, petitioner was precluded, at the instance of respondent, from explaining and defending his use of the term. It would be the height of injustice to permit respondent to take the advantage that it now seeks to take of this situation.

Through similar objections sustained by the Court, petitioner was precluded from giving the sources of information contained in his speech and also from establishing the truthfulness and authenticity of what he said.

Dictionary Definition of "Scum"

In Webster's *New International Dictionary*, Second Edition, Unabridged, 1944, the word "scum" is defined as "anything vile or worthless; hence vile or worthless persons; a rabble of low people". And the word "rabble" is defined as a "tumultuous crowd of people; a mob."

These definitions well fit the lawless rioters who all but surrounded the West End Woman's Club in Chicago on the evening of February 7, 1946, including those referred to by petitioner "who got in by mistake", despite every possible precaution that was taken to restrict attendance at the meeting and keep it "private". The rioters have been universally designated as a "mob" and a most lawless one at that.

Was petitioner's designation of these rioters, collectively, as "scum" justified and warranted? It is respect-

fully submitted that it was, and the wonder is that petitioner, under all of the circumstances revealed by the Record, did not use far stronger language than he did use. The words "scum" and "slimy scum" would aptly describe any lawless mob seeking, as this one did, to deprive American citizens of their rights of *free speech* and *free assembly*.

Chaplinsky Case Not In Point.

Petitioner feels that what is contained on page 22 of his brief concerning *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, relied upon by respondent, is sufficient to show its inapplicability to the case at bar.

However, he wishes to emphasize that the construction placed upon the New Hampshire statute by the lower Court, which construction was accepted and quoted with approval by this Court, was that no words were forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, *individually*, the remark is addressed; and that the statute prohibits no more than the *face-to-face* words plainly likely to cause a breach of the peace by the addressee. There were no "face-to-face" words in petitioner's speech. There were no persons to whom any remark was addressed "individually". Petitioner's speech was addressed generally to an audience of about 800 persons. What possible application of the *Chaplinsky* case can there be to the case at bar?

Petitioner has no quarrel with what is said in the closing words of the opinion in the *Chaplinsky* case about the appellations "damned racketeer" and "damned Fascist". However, in connection with the latter, it is interesting to note the following from the opinion of a distinguished member of this Court in a later case, *Cafeteria Employees'*

Union v. Angelos, 320 U. S. 293, 295: "That the picketing under review was peaceful is not questioned. And to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts."

Petitioner's Speech No "Incitement To Violence".

The Supreme Court of Illinois erroneously held that petitioner's speech "tended to incite the majority of his audience to immediate violence against the angry mob outside". The transcript of the speech (R. 68-79) reveals that it, on the other hand, contains repeated exhortations to the audience to be calm and peaceful and not resort to any violence. For example, he said (R. 68): "So, no matter what noises you hear—sit still. Don't anybody move." Also (R. 77): "They" (meaning the mob) "are being led; there will be violence. That is why I say to you men, *don't you do it.* Walk out of here dignified. *The police will protect you.* Put the women on the inside, where there will be no hurt to them. Just walk; *don't stop and argue.*" (Emphasis added.)

Petitioner's speech, near the close, contains the following (R. 78 and 79):

> "So, my friends, since we spent much time tonight trying to quiet the howling mob, I am going to bring my thoughts to a conclusion, and the conclusion is this. We must all be like the Apostles before the coming of the Holy Ghost. We must not lock ourselves in an upper room for fear of the Jews. I speak of the Communistic Zionistic Jew, and those are not American Jews. We don't want them here; we want them to go back where they came from. We are going to stand one and all together and form a solid phalanx of

courage and loyalty and strength and oppose every attempt to breach freedom of speech in America, every attempt to undermine the morality of America, every attempt to shed American blood to promote Zionism in America, every attempt to demoralize our America, every attempt to persecute our cross, every attempt to destroy the sovereignty of America by union with other countries of the world, giving up our own sovereignty.

"Remember this, my friends, that the Holy Father called upon all of us, Catholics, Protestants alike, to form a crusade, and I have done that, I tried to do it. In this crusade we have only three principles, no organization. You just say you stand for these things. See if you don't stand for them. If you do, let me know. The three principles: God first, that is the first principle; the second principle, America next; the third principle, all other nations last."

And the following are the very last words of his speech:

"Let's go out to found in this nation a Christian new order for America."

And the Record indicates (Page 79), immediately following the speech, that Gerald L. K. Smith took his cue from petitioner in desiring to avoid any violence, when he said: "I would like to ask that Miss Purcell would please go back to the front of the building and contact the police officer in charge of the detail. *We are going to adjourn this meeting if and when Miss Purcell comes back and reports to me that the one in charge of the detail believes it is safe for us to go out on the street.*"

Nowhere in petitioner's speech will be found anything supporting the erroneous ruling mentioned above, to the effect that it "tended to incite the majority of his audience to immediate violence against the mob outside".

No "Libel" Or "Slander" Involved.

Respondent's brief is replete with false and irrelevant charges of "libel" and "slander" against petitioner, and cites these as justification for his wrongful conviction. In this connection, respondent even "drags in" the case of *People v. Spielman*, 318 Ill. 482 (Page 23 of respondent's brief), a case involving a charge of *criminal libel*. This case, of course, has no application to the case at bar, though it is, no doubt, cited because it is unique in upholding a charge of libel against a group.

Respondent cites the case of *Ogren v. Rockford Star Printing Co.*, 288 Ill. 405, in support of the statement that "even in the political arena, defamation of a candidate is punishable by the State". This, of course, involved a civil action for damages for libel against a newspaper. It is difficult to imagine just what bearing it could possibly have upon punishment by the State, and still more so to imagine what possible application it has to this cause.

The case at bar involves no "libel" or "slander", as those words are interpreted legally, and those portions of respondent's brief and argument relating thereto should be ignored by this Court.

The "God Damned Liar" Incident.

The Record seems clear that someone, during the course of the meeting in question, got up and said, "You are a God damned liar", to *a speaker*. But it is not clear whether this was done while petitioner was speaking or during Gerald L. K. Smith's speech which preceded petitioner's. Because of the contention that this episode constituted a "breach of the peace" within the hall while petitioner spoke, incited by his speech, it becomes of some importance to examine the Record carefully concerning it.

Supporting respondent's contention that the incident occurred while petitioner spoke, we find the following:

1. Testimony of Elizabeth Dilling, one of the petitioner's witnesses to that effect (R. 97).

Petitioner contends that the incident occurred while Mr. Smith was speaking, and supporting that contention we find the following:

1. Failure of the court reporter's transcript of petitioner's speech to record the incident, though she did record other untoward incidents occurring while petitioner spoke. (In this connection, it should be borne in mind that the court reporter was engaged by petitioner's opponents to "cover" the meeting and record, stenographically, everything that transpired; also that when she testified, she did so as respondent's witness.)

2. Failure of respondent's witness Karel (R. 82) to say when the incident transpired. According to his testimony, it may have occurred during either of the two speeches.

3. Testimony of petitioner's witness Devane (R. 88), who testified, definitely, as follows: " . . . one man got up when Mr. Smith made some statement, and said, 'You are a God damned liar', and there was some officer escorted him out."

4. Ira Latimer, the complainant in the case, and hence the most important witness for respondent, testified as follows about the incident (R. 64): "One man was ejected from the aisle, from the hall, that is the aisle from where I was sitting at the instance of a number of women who pointed to him, and appeared to be in conversation with him, and *I don't recall whether Father Terminiello or Reverend Smith was speaking at the time.*" (Emphasis added.)

Under these circumstances, petitioner feels amply justified in contending that the incident did not occur while he spoke.

But let us assume, just for the sake of argument, that it did occur while petitioner spoke. What situation confronts us in that case?

On page 26 of its brief, respondent states, "It has been held that the utterance of the above-noted epithet amounts to a breach of the peace", and, in support, cites *Johnson v. State* (Texas Criminal Appeals), 66 S. W. 1097. The nature of that case is indicated by the following from the opinion:

> "The trouble in which defendant is charged with using language calculated to bring on a difficulty was in regard to the failure of Moyer to settle for a meal at the hotel, and it occurred at a livery stable. Moyer remarked to Whittenberg, inside the stable, that defendant had lied in regard to the matter. Whittenberg challenged him to make the statement in the presence of defendant. They walked outside the stable, where defendant was, and Moyer denied the statement of defendant, whereupon defendant" (Johnson) "called him a 'God damned liar', and Moyer struck at him with a rake."

In that case Johnson was found guilty of causing a breach of the peace and fined $5. That case would be in point if petitioner, if in fact he were speaking at the time of the incident, had left the rostrum and rushed down into the hall proper and attempted to assault the one who made the remark. Then, the one making the remark would have been guilty of provoking a breach of the peace and he, not petitioner, might justly have been arrested and prosecuted. This case well illustrates the care that should be exercised in considering any case cited by respondent in its brief.

It should be noted in passing that if respondent's contention is correct, one hostile person might invade a meeting, get up at a time deemed appropriate, and say to a speaker, "You are a God damned liar", thereby rendering the speaker subject to arrest and complete abridgment of his right of *free speech*. In such a case, it will be noted, it would take only one person to accomplish the end sought to be accomplished by the lawless rioters involved in this cause, who were intent upon depriving petitioner of his constitutional rights.

"Clear And Present Danger".

The doctrine that "clear and present danger" of the imminence of substantive evil must be present before the rights guaranteed by the First Amendment to the Constitution of the United States may be abridged has been enunciated and affirmed so repeatedly, and so eloquently, by this Honorable Court that an apology almost seems necessary for extending the length of this reply to comment upon it. That doctrine appears indelibly in the decisions of this Court upon which petitioner relies for the support of his contentions. But petitioner feels that, even so, the following quotations on the subject from Professor Chafee's book will assist the Court in arriving at a proper decision in this cause.

Page 23:

> "The real issue in every free speech controversy is this: whether the state can punish all words which have some tendency, however remote, to bring about acts in violation of law, or only words which directly incite to acts in violation of law.
>
> "If words do not become criminal until they have 'an immediate tendency to produce a breach of the peace,' there is no need for a law of sedition, since

the ordinary standards of criminal solicitation and attempt apply. Under those standards the words must bring the speaker's unlawful intention reasonably near to success. Such a limited power to punish utterances rarely satisfies the zealous in times of excitement like a war. They realize that all condemnation of the war or of conscription may conceivably lead to active resistance or insubordination. Is it not better to kill the serpent in the egg? All writings that have even a remote tendency to hinder the war must be suppressed.

"Such has always been the argument of the opponents of free speech. And the most powerful weapon in their hands, since the abolition of the censorship, is this doctrine of indirect causation, under which words can be punished for a supposed bad tendency long before there is any probability that they will break out into unlawful acts. Closely related to it is the doctrine of constructive intent, which regards the intent of the defendant to cause violence as immaterial so long as he intended to write the words, or else presumes the violent intent from the bad tendency of the words on the ground that a man is presumed to intend the consequences of his acts. When rulers are allowed to possess these weapons, they can by the imposition of severe sentences create an *ex post facto* censorship of the press. The transference of that censorship from the judge to the jury is indeed important when the attack on the government which is prosecuted expresses a widespread popular sentiment, but the right to jury trial is of much less value in times of war or threatened disorder when the herd instinct runs strong, if the opinion of the defendant is highly objectionable to the majority of the population, or even to the particular class of men from whom or by whom the jury are drawn."

And page 155:

"The formal criminal law is willing to run risks for the sake of open discussion, believing that truth will prevail over falsehood if both are given a fair field, and that argument and counter-argument are the best method which man has devised for ascertaining the right course of action for individuals or a nation. It holds that error is its own cure in the end, and the worse the error, the sooner it will be rejected."

Far-Reaching Effect Of The Case At Bar.

Respondent (page 8 of its brief) makes light of petitioner's contention that the "'two party' or 'multi-party' system under which this Country has prospered and become great" will be endangered if his wrongful conviction is permitted to stand. Elsewhere in respondent's brief, petitioner is accused of misunderstanding, or misinterpreting, the doctrine of "previous restraint".

Petitioner feels that his brief speaks for itself as to both of these matters.

But, nevertheless, he is happy to cite in support of one of these contentions the following, written by a far wiser, smarter, and keener student of the law than any appearing in this cause on either side:

"The sound constitutional doctrine is that public authorities have the obligation to provide police protection against threatened disorder at lawful public meetings in all reasonable circumstances. It is their duty to make the right of free assembly prevail over the forces of disorder if by any reasonable effort or means they can possibly do so.

"'In no other way can the right of free assembly be made a reality. Surely it must be clear that in or-

der to "secure" the rights of free speech and assembly against "abridgment", it is essential not to yield to threats of disorder. Otherwise these rights of the people to meet and of speakers to address the citizens so gathered, could not merely be "abridged" but could be destroyed by the action of a small minority of persons hostile to the speakers or to the views they would be likely to express."

And:

"'The right of the people peaceably to assemble' cannot mean that the right ceases unless everybody present, including opponents of the speakers, is certain to be peaceable. Law-abiding speakers and their supporters should not be deprived of the great American institution of assemblage in the open air because other persons are intolerant and ready to violate the law against assault and battery. Such a doctrine would mean that a citizen loses his constitutional rights because his opponent threatened to commit crimes.

"'If a permit can constitutionally be refused on the grounds relied upon by the defendants, a small number of lawless men by passing the word around that they intend to start a riot could prevent any kind of a meeting, not only of radicals or Socialists or trade unionists, but also of Negroes, of Jews, of Catholics, of Protestants, of supporters of German refugees, of Republicans in a Democratic community or *vice versa*. Indeed, on any such theory; a gathering which expressed the sentiment of a majority of law-abiding citizens would be forbidden merely because a small gang of hoodlums threatened to break up the meeting."

This quotation is taken from pages 425 and 426 of Professor Chafee's book, "Free Speech in the United States".

Conclusion.

Free speech is the one and only issue in this cause.

In conclusion, the attention of the Court is respectfully directed to the following, with which Professor Chafee closes Section III of Chapter 14, entitled "Methods of Controlling Discussion in Peace Time", of his book (Page 528):

> "Intolerance can always find some crevice in the administration of the law through which to creep and accomplish its purpose. The only remedy is to build up every day and every hour the opposite spirit, a firm faith that all varieties and shades of opinion must must be given a chance to be heard, that the decision between truth and error cannot be made by human beings, but only by time and the test of open argument and counter-argument, so that each citizen may judge for himself.
>
> "Of later years, whenever any controversy has arisen over discussion, constitutional free speech seems to be always just around the corner. People praise this magnificent fundamental right and then deny that it is applicable to this particular agitator or minority group. We are like Oliver Cromwell when he was besieging a Roman Catholic town in Ireland, which offered to surrender on the one condition of freedom of conscience. Cromwell replied:
>
> "As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the mass, I would have you understand that in no place where the power of Parliament of England prevails shall that be permitted.
>
> "We should do much better to imitate a contemporary Englishman, Lord Justice Scrutton, who freed an Irishman from illegal arrest with these words:
>
> "'The law of this country has been very jealous of any infringement of personal liberty. This care is not to be exercised less vigilantly, because the subject

whose liberty is in question may not be particularly meritorious. It is indeed one test of belief in principles if you apply them to cases with which you have no sympathy at all. You really believe in freedom of speech if you are willing to allow it to men whose opinions seem to you wrong and even dangerous."

Petitioner respectfully urges this Honorable Court to reverse the wrongful judgments of the lower Courts in this cause. Should this be done, not only will petitioner, finally, secure the justice to which he feels entitled, but the decision will have far-reaching effects. It will emphatically serve notice that a great, liberal Court is ever vigilant to see that the sacred rights guaranteed by the Constitution are not lightly, and with impunity, trampled upon.

Respectfully submitted,

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